

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 CENTRAL PUGET SOUND REGION  
3 STATE OF WASHINGTON  
4

5 TOWARD RESPONSIBLE DEVELOPMENT, et  
6 al.,

7 Petitioners,

8  
9 v.

10 CITY OF BLACK DIAMOND,

11  
12 Respondent,

13 And  
14

15 BD LAWSON PARTNERS, LP and BD VILLAGE  
16 PARTNERS, LP,<sup>1</sup>

17 Intervenor.  
18

Case No. 10-3-0014

**ORDER DENYING  
CERTIFICATE OF APPEALABILITY**

**[King County Superior Court  
No. 11-2-07352-1 KNT]**

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20 THIS Matter comes before the Board upon the application of Petitioners Toward  
21 Responsible Development, et al for a second Certificate of Appealability for direct review by  
22 the Court of Appeals.<sup>2</sup> No response – either in support or opposition - was filed by either  
23 Black Diamond or YarrowBay.  
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25  
26 **I. BACKGROUND**

27 Petitioners filed a Petition for Review with the Board seeking review of the City of Black  
28 Diamond's approval of two master planned developments (MPDs) – Lawson Hills and The  
29 Villages - asserting various violations of the Growth Management Act, RCW 36.70A (GMA),  
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32 <sup>1</sup> Intervenor are collectively referred to as YarrowBay.

<sup>2</sup> Application for Direct Review by the Court of Appeals, filed March 17, 2011.

1 and the State Environmental Policy Act, RCW 43.21C (SEPA).<sup>3</sup> In a ruling on dispositive  
2 motions filed by each of the parties, the Board determined not only that it had jurisdiction to  
3 hear the appeal but that Black Diamond had violated the GMA's requirements for public  
4 participation. The February 15, 2011 Order on Motions remanded the ordinances to Black  
5 Diamond; reserving decision on all other substantive issues until the City's completion of the  
6 GMA's public participation process.<sup>4</sup> The Board declined to issue a determination of  
7 invalidity but set an expedited schedule for Black Diamond's compliance with GMA public  
8 participation requirements.  
9

10  
11 Petitioners timely filed a motion for reconsideration of the Board's denial of determination of  
12 invalidity. In its Order Denying Motion for Reconsideration, March 17, 2011, at 2, the Board  
13 ruled:

14       As provided in RCW 36.70A.302, invalidity is a discretionary remedy available to  
15       the Board when a city or county has taken an action which not only fails to  
16       comply with the requirements of the Growth Management Act (GMA), Chapter  
17       36.70A RCW, but substantially interferes with the goals of the GMA.

18 The Board found no basis for reconsideration of its denial of invalidity.<sup>5</sup>  
19

20 Yarrow Bay appealed the Board's Order on Motions to King County Superior Court, Cause  
21 No. 11-2-07352-1 KNT. The Petitioners then filed an Application for Direct Review by the  
22 Court of Appeals as to the jurisdictional ruling in the Board's Order on Motions. Finding that  
23 the matter presented fundamental issues of regional importance concerning the jurisdiction  
24 of the Growth Management Hearings Board, the Board on April 21, 2011 issued a  
25 Certificate of Appealability.  
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31 <sup>3</sup> Filed November 19, 2010.

32 <sup>4</sup> Order on Motions, issued February 15, 2011.

<sup>5</sup> Board member Raymond Paoletta dissented.  
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1 Petitioners now seek an additional certificate of appealability for direct review of the Board's  
2 decision not to make a determination of invalidity and its subsequent order denying  
3 reconsideration on that issue.

4  
5 On April 8, 2011, the King County Superior Court issued a stay of the Board's February 15  
6 Order on Motions.<sup>6</sup>

## 8 II. AUTHORITY AND ANALYSIS

9 Pursuant to the Administrative Procedure Act, RCW 34.05.518, Petitioners seek a  
10 Certificate of Appealability. RCW 34.05.518(3) identifies growth management boards as  
11 "environmental boards," and establishes the following criteria for a certificate of  
12 appealability: (Emphasis added)

13  
14 (b) An environmental board may issue a certificate of appealability if it finds  
15 that **delay in obtaining a final and prompt determination of the issues**  
16 **would be detrimental** to any party or the public interest **and either:**

17 (i) **Fundamental and urgent statewide or regional issues** are raised; or

18 (ii) The proceeding is likely to have **significant precedential value**.  
19

20 RCW 34.05.518(4) requires a board to state in its certificate of appealability "which criteria it  
21 applied [and] explain how that criteria was met." In applying these criteria, the Board finds  
22 and concludes as follows:

### 24 A. Detrimental Delay

25 With respect to the denial of a determination of invalidity, the Board finds that delay in  
26 resolving this issue is not detrimental to the public interest. Petitioners cite to the importance  
27 of finality and certainty in land use decisions and how a prompt resolution would avoid  
28 unnecessary delay and expense.<sup>7</sup> Petitioners further note that given the extensive size of  
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32 <sup>6</sup> Stay issued on April 8, 2011 by the Honorable Judge Cheryl Carey.

<sup>7</sup> Application for Direct Review, at 3-4.

1 the approved MPDs, covering approximately 1,500 acres, uncertainty regarding  
2 development not only results in residents of the community but also neighboring jurisdictions  
3 being in "limbo pending resolution" of the litigation.<sup>8</sup> However, the Board has already  
4 provided a certificate of appealability with respect to its Order on Motions. Further, the Court  
5 of Appeals Division II has recently clarified that third parties may not proceed in reliance on  
6 local ordinances which have been found non-compliant by the Growth Board and are on  
7 appeal in the courts.<sup>9</sup> Thus the assertion that delay in resolving the invalidity question is  
8 separately detrimental to the public or the community appears unfounded.  
9

10  
11 As to the interests of the City and YarrowBay, they may well prefer delay<sup>10</sup> so that the City  
12 can continue to process YarrowBay's subdivision and development permit applications  
13 under the non-compliant ordinances.  
14

15 Delay is clearly **detrimental to Petitioners' interests**, however, as they seek to avoid  
16 vesting of substantial development pending resolution of the litigation. The Board therefore  
17 proceeds to analysis of the remaining criteria for the requested certification.  
18

### 19 **B. Fundamental or Urgent Statewide or Regional Issues Raised**

20 As stated in the Board's Order Denying Reconsideration, invalidity is a discretionary remedy  
21 available to the Board when a city or county takes action which not only fails to comply with  
22 the GMA but substantially interferes with the goals of the Act. The GMA requires that  
23 invalidity be determined on a case-by-case basis:  
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25  
26 RCW 36.70A.302(1) A board may determine that part or all of a comprehensive plan  
27 or development regulations are invalid if the board:  
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30 <sup>8</sup> Application for Direct Review, at 4.

31 <sup>9</sup> *Clallam County v. Dry Creek Coalition*, No. 39601-7-II, 24-25 (Wash. Ct. App. Division II, Apr. 20, 2011);  
32 *Clark County/Karpinski v Western Washington Growth Management Hearings Board*, No. 39546-1-II, 10  
(Court of Appeals Division II, Apr. 13, 2011).

<sup>10</sup> As noted, the City sought a stay from Superior Court.

- 1 (a) Makes a finding of noncompliance and issues an order of remand under RCW  
2 36.70A.300;  
3 (b) Includes in the final order a determination, supported by findings of fact and  
4 conclusions of law, that the continued validity of part or parts of the plan or  
5 regulation would substantially interfere with the fulfillment of the goals of this  
6 chapter: and  
7 (c) Specifies in the final order the particular part or parts of the plan or regulation that  
8 are determined to be invalid, and the reasons for their invalidity.

9 In the present case, the Board determined the specific *public participation process* used by  
10 Black Diamond in adopting the challenged ordinances did not comply with the GMA's public  
11 participation goal – Goal 11;<sup>11</sup> nevertheless, the continued validity of the ordinances would  
12 not thwart fulfillment of Goal 11, as the matter would be remanded for reconsideration by the  
13 city after appropriate public procedure.

14 Although the City's process, as determined in the Order on Motions, was fundamentally  
15 flawed, all parties here acknowledge the public was informed and engaged in the City's  
16 action. On this record, the Board **cannot find that fundamental and urgent statewide and**  
17 **regional issues are raised.**

### 18 **C. Significant Precedential Value**

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20 Petitioners contend this appeal is likely to have significant precedential value regarding the  
21 issue of invalidity. Petitioners assert the courts have "never directly addressed the issues  
22 presented by this case, including how to apply the 'substantial interference' standard in  
23 RCW 36.70A.302."<sup>12</sup>  
24

25  
26 However, the Court of Appeals in *Davidson Serles, et al v City of Kirkland*, has recently  
27 clarified the case-by-case nature of Growth Board determinations of invalidity, finding that  
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31 <sup>11</sup> RCW 36.70A.020(11): "Citizen participation and coordination. Encourage the involvement of citizens in the  
32 planning process and ensure coordination between communities and jurisdictions to reconcile conflicts."

<sup>12</sup> Petitioner's Application for Direct Review, at 11.

1 limitation in “the plain terms of the GMA” and in the earlier reasoning of *Skagit Surveyors*.<sup>13</sup>  
2 In *Davidson Serles*, the Court ruled that Court-developed remedies of *ab initio* invalidity for  
3 SEPA violations were not applicable to the Board’s jurisdiction, which requires case-by-case  
4 determination of whether GMA goals are frustrated.<sup>14</sup> The Court noted: “The board’s  
5 statutory authority to invalidate actions, ... is not mandatory and certainly is not absolute.”<sup>15</sup>  
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7 When GMA Goal 11 and public participation requirements have been violated, the Board  
8 considers the facts and circumstances of the case to determine whether a declaration of  
9 invalidity is warranted.<sup>16</sup>  
10

11 Thus the Board finds that resolving the dispute between these parties, regarding whether  
12 invalidity should have been imposed under the facts and circumstances of this case, will  
13 resolve the question for these parties, but will not have precedential value.<sup>17</sup> The Board  
14 thus concludes that the **proceeding is not likely to have significant precedential value.**  
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### 16 17 18 III. ORDER

19 Having reviewed the Petitioners’ Application for Direct Review by the Court of Appeals, the  
20 relevant provisions of the Administrative Procedures Act, in particular RCW 34.05.518(3)(b),  
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22 <sup>13</sup> 159 Wn.App. 148, 157, n. 7, 244 P.3d 1003 (Dec. 27, 2010), citing *Skagit Surveyors & Eng’rs, LLC v*  
23 *Friends of Skagit County*, 135 Wn.2d 542, 562, 958 P.2d 962 (1998) (because of the different circumstances  
24 in which the issue of invalidity may arise, GMHB is given “discretion to make the determination on a case-by-  
25 case basis.”)

26 <sup>14</sup> 159 Wn. App. at 158-159.

27 <sup>15</sup> 159 Wn.App. at 160.

28 <sup>16</sup> See orders imposing invalidity based on a Goal 11 violation, e.g.: *Dragonslayer, et al v Clark County*,  
29 WWGMHB Case No. 04-2-0008, Order on Motions on Remand (June 19, 2007), at 8 (“if the MOU continues in  
30 effect, the ability of the public to have input into the County’s decisions may be nullified...”); *Neighbors for*  
31 *Responsible Development v. City of Yakima*, EWGMHB Case No. 02-1-0009 (Dec. 5, 2002), at 33-36;  
32 *WHIP/Moyer v City of Covington*, CPSGMHB Case No. 03-3-0006c, Final Decision and Order (July 31, 2003),  
at 28-29; *Vinatieri et al v Lewis County*, WWGMHB Case No. 03-2-0020c, Compliance Order (Jan. 7, 2005), at  
10, 12.

Compare, orders declining to invalidate based on public participation and Goal 11 violation, e.g.: *Roth, et al v*  
*Lewis County*, WWGMHB Case No. 04-2-0014c, Final Decision and Order (Dec. 10, 2004), at 17-18; *Lora*  
*Petso v City of Edmonds*, SPSGMHB Case No. 09-3-0005, Final Decision and Order (Aug. 17, 2009); *McVittie*  
*IV v. Snohomish County*, CPSGMHB Case No. 01-3-0002, Final Decision and Order (July 25, 2001).

<sup>17</sup> Nonetheless, the Board welcomes guidance from the Court.

1 the Board's April 21, 2010 Certificate of Appealability, and the facts of this matter, the Board  
2 finds that delay in obtaining a final and prompt determination of the issue of invalidity may  
3 be detrimental to interests of the petitioners. However, the Board finds (1) no fundamental  
4 issues of regional or statewide importance are raised and (2) a judicial determination is  
5 unlikely to have significant precedential value.  
6

7 Having found that the criteria of RCW 34.05.518(3) are not satisfied, **the Board declines to**  
8 **issue a Certificate of Appealability** as to the March 17, 2011 Order Denying Motion for  
9 Reconsideration in this matter.  
10

11 SO ORDERED this 17th day of May, 2011.  
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14 David O. Earling, Presiding Officer  
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17 Margaret A. Pageler, Board Member  
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19 Concurrence of Board Member Raymond L. Paoella  
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21 I concur with the result reached by the majority under the particular facts and circumstances  
22 presented by this Application for Direct Review. I write separately to add additional GMA  
23 authority relating to the underlying issue of GMHB invalidity determinations. In addition to  
24 the authority in RCW 36.70A.302(1), RCW 36.70A.330(4) provides as follows: "In a  
25 compliance hearing upon petition of a party, the board shall also reconsider its final order  
26 and decide, if no determination of invalidity has been made, whether one now should be  
27 made under RCW 36.70A.302."  
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30 Raymond L. Paoella, Board Member  
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